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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CARMEN PAIZ, Defendant and Appellant.	A125235 (San Francisco County Super. Ct. No. 167186)

I. INTRODUCTION

In 1997, appellant was charged by a complaint filed by the San Francisco District Attorney's office with four counts of drug-related offenses. In March of that year, pursuant to a plea negotiation, she pled guilty to one of those counts, and the remainder were dismissed. The trial court suspended sentence and placed appellant on probation for a term of three years; her term of probation expired in 2000. On November 25, 2008, over 11 years after the sentencing hearing in the trial court, appellant filed a petition in San Francisco Superior Court for the issuance of a writ of error *coram nobis* challenging her 1997 conviction. The superior denied that petition and appellant appeals from that order. We affirm the denial of the petition.

II. FACTUAL AND PROCEDURAL BACKGROUND

Appellant entered the United States from her home in Guatemala in April 1984, and applied for asylum 10 years later, i.e., in 1994. She has four children who, in 2007, were ages 17, 14, 9 and 3.

On January 23, 1997, appellant was pulled over by San Francisco police while driving a Ford Bronco registered in her name. Her (then) 17-year old sister was a passenger in the car with appellant. A search of the vehicle revealed cocaine and over 14.25 grams of heroin under the driver's and passenger's seats of the car.

On January 28, 1997, a complaint was filed charging appellant with four counts, namely: (1) possession of heroin for sale (Health & Saf. Code, § 11351)[1]; (2) possession of cocaine for sale (§ 11351); (3) transportation of heroin (§ 11352, subd. (a)); and (4) maintaining a place for the purpose of selling, giving away, or using heroin (§ 11366).

As noted above, on March 26, 1997, appellant pled guilty to the first count in exchange for dismissal of the remaining three and a grant of probation. Consistent with that plea bargain, on April 23, 1997, imposition of sentence was suspended and appellant was placed on probation for a term of three years. Appellant's probation expired on April 23, 2000, because the trial court denied the probation department's motion to extend her probationary term for one year because appellant had not paid the ordered fine of $500.

At the March 1997 hearing, appellant was specifically advised, pursuant to Penal Code section 1016.5, that "if you are not a citizen, a conviction of the offense with which you have been charged could have the consequences of deportation, exclusion from admission to the United States or denial of naturalization under the laws of the United States." She specifically affirmed that she understood those warnings and admonitions, and was not entering her guilty plea to help her co-defendant, one Abel Torres Deltoro (her former husband), or because the latter had threatened her.

In, apparently, early 2006, appellant hired an immigration attorney. That attorney told her that she could not get asylum or become a permanent resident of the United States, and that she faced removal and a permanent bar to reentry, because of her 1997 conviction.

[1] All further statutory references are to the Health and Safety Code unless otherwise noted.

As, apparently, a result of this, on September 24, 2007, appellant signed a declaration in support of a *coram nobis* petition. In it she alleged that, when she was arrested in January 1997 (1) she knew nothing about the drugs in the car, (2) her former husband and then-codefendant, Deltoro, often used the car, (3) the police threatened to take her children away and to prosecute her younger sister (who, again, was in the car with her) unless she admitted ownership of the drugs, and (4) the police also promised her that, if she admitted ownership of the drugs, her sister would not be charged, she would avoid jail or prison, and would be allowed to keep her children.

She alleged in that declaration that her 1997 counsel told her he would fight the case "if that was what I wished" but that she had decided not to do so "because of what the officer had said when I was arrested about losing my children."

Also in September 2007, appellant's sister, then 28 years old, signed a declaration stating that appellant had called her from the jail in 1997 and stated that the "police had threatened to take away her children and to charge me with a crime unless [appellant] admitted that the drugs were hers. [Appellant] told me she did so even though she did not know the drugs were in the car so that I would be let go and so that she would not lose her children."

Notwithstanding the execution of these declarations in 2007, it was not until November 25, 2008, that appellant filed her petition for a writ of error *coram nobis.*

On March 5, 2009, the trial court denied the petition via a written order which, in essence, held that the petition should be denied because of a lack of diligence on the part of appellant in pursuing that remedy.

Appellant filed a timely notice of appeal.

III. DISCUSSION

We review denial of a *coram nobis* petition under the abuse of discretion standard of review. (See *People v. Kim* (2009) 45 Cal.4th 1078, 1095-1096 (*Kim*), and cases cited therein.) We find no such abuse here.

By its order of March 5, 2009, the trial court denied the petition because of a lack of diligence on the part of appellant in pursuing her alleged claims of wrong. Rather

remarkably, just 11 days later, i.e., on March 16, 2009, our Supreme Court issued its decision in *Kim*, holding to the same effect as the trial court here, and doing so on rather similar facts.

In *Kim*, the defendant immigrated to this country at age six from South Korea, and became a "lawful permanent resident in 1986 and has resided continuously in this country since his initial entry." (*Kim, supra,* 45 Cal.4th at pp. 1084-1085.) However, that person had several juvenile arrests and had both been made a ward of the court and placed on probation before turning 18. (*Id.* at p. 1085.) Within months after turning 18, defendant was arrested and later convicted of first degree burglary, but then placed on probation by the Monterey County Superior Court. Within the following two years, however, he was arrested and convicted twice again for theft-related crimes. In connection with the latter conviction, which was part of a 1997 plea negotiation, the defendant had executed a plea form which acknowledged: " 'I understand that if I am not a citizen of the United States a plea of "Guilty/No Contest" could result in deportation, exclusion from admission to this country, and/or denial of naturalization.' " (*Id.* at pp. 1085-1086.)

All of which, per our Supreme Court, plunged Kim into "a labyrinth of legal problems," all related to his status as a lawful resident, but not a citizen, of this country. Included in this series of developments was a detention by the federal INS for almost six months in 1999, and then the initiation of deportation (aka "mandatory removal") proceedings by the INS in 2002. (*Kim, supra,* 45 Cal.4th at p. 1086.)

To counter this, Kim "began filing collateral challenges to his various state convictions in an attempt to eliminate them as the basis for deportation" throughout 2003 and 2004. (*Kim, supra,* 45 Cal.4th at pp. 1087-1088.) When these did not solve his problems with the INS, in 2005 Kim filed two motions in Monterey County Superior Court. The first was entitled " 'Motion to Vacate Judgment (Coram Nobis)' " and sought to vacate one of his earlier convictions for felony petty theft with a prior theft-related conviction. (*Id.* at p. 1089.) One of the allegations of this motion was that his 1997 plea was not " 'knowing, intelligent, free or voluntary, and was thus void *ab initio*' " under the

U.S. Constitution.[2] (*Ibid*.) Kim's 1997 attorney also filed a supporting declaration elaborating on both his and Kim's alleged lack of knowledge of the immigration-related consequences of his plea. (*Id.* at pp. 1089-1090.) The trial court granted this motion and also the companion motion, and specifically cited in support of its ruling his prior counsel's admission of his lack of knowledge of the immigration-consequences of Kim's 1997 plea. The Sixth District Court of Appeal reversed the grant of the *coram nobis* petition, however, and our Supreme Court granted review. (*Ibid.*) Notwithstanding its acknowledgment of the abuse of discretion standard of review of a trial court's ruling on a petition for a writ of error *coram nobis* (*id.* at pp. 1095-1096), the court affirmed the Court of Appeal's reversal of the trial court.

In so doing, Justice Werdegar, writing as noted earlier for a unanimous court, explained in detail both the background and purpose of the common law writ of error *coram nobis* and, even more importantly for present purposes, "the limited nature" and "narrowness of the remedy." (*Kim, supra,* 45 Cal.4th at pp. 1092-1093.) She explained: "The writ of error *coram nobis* is a nonstatutory, common law remedy whose origins trace back to an era in England in which appeals and new trial motions were unknown. 'Far from being of constitutional origin, the "proceeding designated 'coram nobis' . . . " . . . was contrived by the courts at an early epoch in the growth of common law procedure to provide a corrective remedy ' "because of the absence at that time of the right to move for a new trial and the right of appeal from the judgment." ' [Citation.] The grounds on which a litigant may obtain relief via a writ of error *coram nobis* are narrower than on habeas corpus [citation]; the writ's purpose 'is to secure relief, where no other remedy exists, from a judgment rendered while there existed some fact which would have prevented its rendition if the trial court had known it and which, through no negligence or fault of the defendant, was not then known to the court.' [Citation.] . . .

[2] The second motion was one which our Supreme Court treated as essentially redundant with the *coram nobis* petition. (See *Kim, supra,* 45 Cal.4th at p. 1096.)

"We long ago emphasized the limited nature of this legal remedy. Quoting from an old treatise, we opined the writ of error *coram nobis* ' "does not lie to correct any error in the judgment of the court nor to contradict or put in issue any fact directly passed upon and affirmed by the judgment itself. If this could be, there would be no end of litigation. . . . The writ of error *coram nobis* is not intended to authorize any court to review and revise its opinions; but only to enable it to recall some adjudication made while some fact existed which, if before the court, would have *prevented the rendition of the judgment*; and which without fault or negligence of the party, was not presented to the court." ' [Citation.] As one Court of Appeal described it: 'It is not a writ whereby convicts may attack or relitigate just any judgment on a criminal charge merely because the unfortunate person may become displeased with his confinement or with any other result of the judgment under attack.' [Citation.]

"With the advent of statutory new trial motions, the availability of direct appeal, and the expansion of the scope of the writ of habeas corpus, writs of error *coram nobis* had, by the 1930's, become a remedy 'practically obsolete . . . except in the most rare of instances' [citation] and applicable to only a 'very limited class of cases' [citation]. (See Prickett, *The Writ of Error Coram Nobis in California* (1990) 30 Santa Clara L.Rev. 1, 14–24; 6 Witkin & Epstein, Cal. Criminal Law [(3d ed. 2000)] Criminal Judgment, § 182, p. 211 ['The statutory motion for new trial has, for most purposes, superseded the common law remedy; and, until recent years, coram nobis was virtually obsolete in California.'].)

"The seminal case setting forth the modern requirements for obtaining a writ of error *coram nobis* is *People v. Shipman* (1965) 62 Cal.2d 226 [(*Shipman*)]. There we stated: 'The writ of [error] *coram nobis* is granted only when three requirements are met. (1) Petitioner must "show that some fact existed which, without any fault or negligence on his part, was not presented to the court at the trial on the merits, and which if presented would have prevented the rendition of the judgment." [Citations.] (2) Petitioner must also show that the "newly discovered evidence . . . [does not go] to the merits of issues tried; issues of fact, once adjudicated, even though incorrectly, cannot be

reopened except on motion for new trial." [Citations.] This second requirement applies even though the evidence in question is not discovered until after the time for moving for a new trial has elapsed or the motion has been denied. [Citations.] (3) Petitioner "must show that the facts upon which he relies were not known to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion for the writ. . . ." ' (*Id*. at p. 230.) These factors set forth in *Shipman* continue to outline the modern limits of the writ. [Citation.]

"Several aspects of the test set forth in *Shipman* illustrate the narrowness of the remedy. Because the writ of error *coram nobis* applies where *a fact* unknown to the parties and the court existed at the time of judgment that, if known, would have prevented rendition of the judgment, '[t]he remedy does not lie to enable the court to correct errors of law.' [Citations.] Moreover, the allegedly new fact must have been unknown and must have been in existence at the time of the judgment. [Citation.]" (*Kim, supra,* 45 Cal.4th at pp. 1091-1093, fns. omitted.)

A few pages later, applying these principles to the facts presented, Justice Werdegar went on to explain why the writ of error *coram nobis* was clearly not available to defendant Kim and that, therefore, the trial court had abused its discretion in granting his petition for such a writ: "Before we turn to the merits of these claims, however, we find defendant's entitlement to the writ fails at the threshold for three distinct procedural reasons. First, he has not satisfied the requirement that he show due diligence when seeking such extraordinary relief. 'It is well settled that a showing of diligence is prerequisite to the availability of relief by motion for *coram nobis*' [citations], and the burden falls to defendant 'to explain and justify the delay' [citation]. '[W]here a defendant seeks to vacate a solemn judgment of conviction . . . the showing of diligence essential to the granting of relief by way of *coram nobis* should be no less than the similar showing required in civil cases where relief is sought against lately discovered fraud. In such cases it is necessary to aver not only the probative facts upon which the basic claim rests, but also *the time and circumstances under which the facts were discovered,* in order that the court can determine as a matter of law whether the litigant

proceeded with due diligence; a mere allegation of the ultimate facts, or of the legal conclusion of diligence, is insufficient.' [Citations.]

"This diligence requirement is analogous to that which we apply to petitions for writs of habeas corpus, where we require a petitioner to set forth with specificity when the 'petitioner or his or her counsel knew, or reasonably should have known, of the information offered in support of the claim and the legal basis for the claim.' [Citation.] Indeed, we previously have recognized that petitions for writs of habeas corpus and error *coram nobis* are essentially identical in this regard. [Citation.]

"The diligence requirement is not some abstract technical obstacle placed randomly before litigants seeking relief, but instead reflects the balance between the state's interest in the finality of decided cases and its interest in providing a reasonable avenue of relief for those whose rights have allegedly been violated. '[I]t is *the trial* that is the main arena for determining the guilt or innocence of an accused defendant . . . . At trial, a defendant is afforded counsel and a panoply of procedural protections, including state-funded investigation expenses, in order to ensure that the trial proceedings provide a fair and full opportunity to assess the truth of the charges against the defendant and the appropriate punishment. Further . . . [i]t is the *appeal* that provides the basic and primary means for raising challenges to the fairness of the trial.' [Citation.] Thus, although *coram nobis* exists as a possible remedy in cases where this system breaks down, the availability of that extraordinary remedy, like habeas corpus, 'properly must be tempered by the necessity of giving due consideration to the interest of the public in the orderly and reasonably prompt implementation of its laws and to the important public interest in the finality of judgments.' [Citation.] Nor is the diligence requirement for *coram nobis* unique, for in addition to habeas corpus petitions, we require diligence for other types of collateral attacks on the validity of a plea. [Citations.]

"In this case, defendant—who presumably knew he was not a citizen—entered his plea in April 1997 and initialed the statement stating he understood his plea 'could result in deportation, exclusion from admission to this country, and/or denial of naturalization.' The INS first moved to deport him in December 1998, filing a notice to appear. Upon his

parole from state prison in February 1999, he was immediately detained by federal immigration authorities. Although he was involved in the state and federal judicial systems and was represented by counsel throughout this time, he did not file his petition for a writ of error *coram nobis* or move to vacate his plea until July 2005, almost seven years after the INS first attempted to deport him. [Citation.]

"Further undermining his claims, defendant fails to allege with specificity when he learned the facts forming the basis of his petition. He declared in an affidavit accompanying his petition that (1) he is concerned he would be forced to serve in the South Korean military if deported; (2) that he may be punished for refusing on religious grounds; (3) that he was not aware at the time he entered his plea that he was admitting a deportable offense; and (4) that had he known he had the option of pleading to a different, nondeportable offense, 'I would have worked with my attorney to bring it to the attention of the court in negotiating an equivalent plea and sentence that [would have] avoided my deportation.' But nowhere does he allege when he learned these facts.

"Counsel himself declared that at the time of the plea he was 'unaware' the plea would render defendant deportable, although he does not speak to whether he failed to investigate. He further declares that, had he been aware an alternative plea to burglary in the language of the statute would have avoided deportation, 'I believe there is a reasonable probability the prosecution and court would have been willing to agree to this plea.' Although counsel mentions he subsequently became aware of the immigration consequences defendant faces, he does not declare when he learned of these facts.

"In sum, with regard to the allegedly new facts on which defendant relies for his petition for the writ of error *coram nobis*, he fails to allege with specificity 'the time and circumstances under which the facts were discovered' so as to permit this court to 'determine as a matter of law whether [defendant] proceeded with due diligence.' [Citation.]" (*Kim, supra,* 45 Cal.4th at pp. 1096-1099, fns. omitted.)

As noted earlier, only 11 days before the publication of *Kim,* the trial court in this case (the Honorable Charles Haines) denied this appellant's petition for a writ of error *coram nobis* on almost exactly the same grounds as those principally relied upon by our

Supreme Court in *Kim*, i.e., lack of diligence in pursuing a remedy for what was later perceived to be a damaging plea of guilty or no contest to a criminal charge by a non-citizen of this country. It stated: "A writ of error *coram nobis* allows the court that rendered judgment 'to reconsider it and give relief from errors of fact.' [Citation.] On *coram nobis*, the petitioner must establish: (1) that some fact existed which, without her fault or negligence, was not presented to the court at the trial and which would have prevented the rendition of the judgment; (2) that the new evidence does not go to the merits of the issues of fact determined at trial; and (3) that she did not know, nor could she have, with due diligence, discovered the facts upon which she relies any sooner than the point at which she petitions for the writ. [Citation.]

"Petitioner's claim fails because she was aware of this alleged error at the time of her plea. Petitioner understood her true reasons for pleading guilty when she entered the plea and has been aware of this 'error' for almost twelve years. Therefore it cannot be said that she 'did not know nor could [s]he have, with due diligence, discovered the facts upon which [s]he relies any sooner than the point at which [s]he petitions for the writ.' [Citation.]

"To justify the twelve-year delay in bringing this claim, Petitioner identifies a different error. She contends that only when she retained the services of an immigration lawyer in 2006 did she learn the immigration consequences of her conviction. An error of this nature cannot support a *coram nobis* claim for several reasons. Lack of knowledge about the effect of immigration status involves a legal issue, which cannot be corrected on *coram nobis* petition. [Citation.] Moreover, the immigration consequences of a conviction are not a basis for *coram nobis* if the court's knowledge of those consequences would not have prevented rendition of the judgment. [Citation.] Regardless, whether this error satisfies the third prong of the *Soriano* analysis[**3**] is not at

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3 The trial court was citing a case also cited in *Kim* (see 45 Cal.4th at pp. 1095, 1103-1104), *People v. Soriano* (1987) 194 Cal.App.3d 1470 (*Soriano*), a decision by a panel of this court in which we affirmed an order denying a petition for a writ of error *coram nobis* and, in so doing, relied upon the three-part test set forth in *Shipman, supra,*

issue here, because Petitioner presents the involuntary nature of her plea as the basis for her petition.

"In sum, Petitioner identifies one error to satisfy the first prong of the *Soriano* analysis, but a different error to satisfy the third prong. Petitioner fails to identify any factual error that satisfies all three. As such, she fails to meet the requirements for a writ of error *coram nobis*."

In appellant's opening brief to us (she filed no reply brief), she contends that the trial court's ruling was incorrect because it cited *two different failures* by appellant that, respectively, demonstrated that she had not satisfied the first and third tests set forth in both *Shipman* and *Kim.* This argument simply does not work. Both of those cases made clear that the three-part test for establishing the (very rare) validity of a *coram nobis* petition are conjunctive, i.e., *all three tests* must be satisfied. The fact that two of them are not satisfied, albeit for different reasons as the trial court concluded here, does not matter in the slightest. The facts are clear, as noted by the trial court, that, contrary to the first of the *Shipman-Kim* tests for diligence, appellant did not advise the trial court of any police threat to "take away" her children at the time of the 1997 plea hearing. Further, at the plea hearing in March 1997, appellant (1) was specifically advised that "if you are not a citizen, a conviction of the offense with which you have been charged could have the consequence of deportation . . . or denial of naturalization under the laws of the United States" and (2) denied she was pleading guilty because of any threats from her former husband. Notwithstanding these statements and inquiries by the trial court, appellant raised no issues even hinting at any invalidity in her plea either then or at any subsequent time until her November 2008 petition for a writ of error *coram nobis.*

Especially in light of our Supreme Court's holding in *Kim*, we have no difficulty in concluding that the trial court's denial of a writ of error *coram nobis* did not amount to an abuse of discretion. Appellant waited (1) over 11 and a half years after the entry of

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62 Cal.2d at page 230, the test specifically cited and relied upon by the *Kim* court. (Compare *Kim, supra,* 45 Cal.4th at pp. 1092-1093 with *Soriano, supra,* 194 Cal.App.3d at p. 1474.)

her plea of guilty (versus seven years in *Kim*) and (2) over two and a half years after retaining an immigration attorney to file her petition for a writ of error *coram nobis* herein. And, of course, during that period she did not file an appeal, a motion to withdraw her plea under Penal Code section 1018, or a petition for a writ of habeas corpus, nor undertake any of the other collateral attack efforts pursued by Kim after the entry of his plea of guilty.

In short, appellant has not even come close to satisfying the diligence requirement of *Kim* and the numerous other cases, including *Shipman* and our opinion in *Soriano*, articulating that requirement.

IV. DISPOSITION

The order appealed from is affirmed.

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Haerle, Acting P.J.

We concur:

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Lambden, J.

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Richman, J.